

The sole issue to be considered on appeal is the nature and extent of claimant's disability. Claimant initially raised an additional issue relating to the decision by the Administrative Law Judge denying permanent partial benefits at a preliminary hearing. That issue is rendered moot by the Award entered in this case and the fact that the weekly benefits awarded exceed the amount of temporary partial benefits sought.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board finds, for the reasons stated below, that the claimant is entitled to benefits based upon sixty-seven percent (67%) permanent partial general disability.

Claimant was injured on September 7, 1990 when he was shot in both legs by an intruder who had entered the hotel through the kitchen where claimant worked. Claimant suffered both physical and psychological injuries. The psychological injuries were directly related to the physical injuries. He returned to work for respondent in July of 1991. He was expected to work four (4) hours per day. On occasion he was asked to work more than four (4) hours and as a result left employment for respondent. He thereafter took a job with Duffen's Optical where he worked approximately seventeen (17) hours per week. He was laid off from this position at Duffen's Optical.

Three medical experts testified regarding the nature and extent of claimant's injuries. Dr. Lowry Jones, claimant's treating orthopedic surgeon, testified that claimant's major problems were psychological. He rated claimant's physical impairment as two percent (2%) to the body as a whole for the left leg injury and four percent (4%) for the injury to the right leg. He described the psychological condition as intentional tremors. According to Dr. Jones, intentional tremors are a condition which prevents claimant from converting a command or direction into physical movement. As an example, Dr. Jones indicated claimant could move his foot voluntarily, but probably could not move his foot in response to a direction from another person. Dr. Jones classified claimant's psychological condition as somewhere between a Class III and a Class IV. He testified that Class IV needs assistance in day-to-day living and performing day-to-day activities, including self-care activities. He did not consider claimant to be fully Class IV. He would not, on the other hand, place claimant in Class III because Class III should be able to work a medium duty job forty (40) hours per week and claimant could not. He recommended that claimant restrict his work activities to lifting ten (10) pounds frequently or thirty-four (34) pounds occasionally. He also suggested that he only occasionally push/pull and that he not bend, squat, crawl, climb or reach above shoulder level frequently.

Dr. P. Brent Koprivica, an occupational physician, examined and evaluated claimant at the request of claimant's counsel. He rated claimant's total impairment for the physical injury as twenty-four percent (24%) to the body as a whole. In addition to ratings given for each injury to each leg, Dr. Koprivica concluded claimant suffered a ten percent (10%) impairment to the general body for injury to his low back. He recommended, based upon the physical problems only, that claimant limit his work to twenty (20) hours per week, standing no more than one (1) hour at a time and indicated claimant was unable to do fine manipulation with his feet, unable to squat, crawl or climb, and unable to lift from the floor. He also diagnosed intentional tremor.

Dr. G. R. Wurster, a psychiatrist, examined and treated claimant. He diagnosed depression, somatoform pain disorder, and post-traumatic stress syndrome. He classified the condition, as had Dr. Lowry Jones, as between Class III and Class IV. He considered the post-traumatic stress disorder to be related to claimant's gunshot wounds and injuries. He described claimant as a very frightened individual with moderate to severe difficulty functioning. He concluded claimant should eventually be able to engage in full-time employment, but did not believe claimant would consider it now. Dr. Wurster expressed his hope that claimant would start working on a part-time basis and work up to full-time.

He also indicated that a job would help claimant's psychological condition more than any other treatment.

Claimant's attorney engaged the services of Richard Santner to evaluate the effect of injury on claimant's ability to earn wages and work in the open labor market. Based upon the restrictions suggested by Dr. Koprivica, Richard Santner concluded that claimant would have an eighty-five percent (85%) loss of ability to perform jobs in the open labor market. Based upon the restrictions recommended by Dr. Jones, he considered the loss to be eighty-three percent (83%) of ability to perform jobs in the open labor market. The Appeals Board considers it appropriate to give both opinions equal weight and finds claimant has an eighty-four percent (84%) loss of ability to perform work in the open labor market.

Richard Santner also expressed his opinion that post injury claimant could perform work with a wage of \$5.50 to \$6.00 per hour. Based upon the restrictions and medical opinions, he thought it might be difficult for claimant to find substantial gainful employment as defined by the Social Security Administration which supposes a thirty (30) hour work week and a minimum wage. Even though claimant has some special skills as an interpreter between French and English, he expected such work to be intermittent.

Claimant's counsel contends claimant is not capable of engaging in substantial and gainful employment. Claimant's counsel emphasizes the severity of the restrictions and suggests, as a practical matter, claimant will not be able to engage in substantial employment. Although, given the nature of the restrictions, this argument does have some appeal, the Appeals Board does not agree. Claimant worked after the surgery for a period of time. The few occasions when he was required to work more than four (4) hours seemed to be a significant factor in his decision to leave employment for respondent. He performed work, apparently successfully, at Duffen's Optical until his layoff. The Appeals Board, on the other hand, considers it likely that he will for the foreseeable future be limited to working no more than twenty (20) hours per week. Because of the twenty (20) hours per week limitation, the Appeals Board finds that claimant has suffered, as Richard Santner originally indicated in his report, a fifty percent (50%) loss of ability to earn comparable wages. The projected post-injury hourly rate is comparable to his pre-injury hourly wage.

The Appeals Board also finds it appropriate in this case to give equal weight to claimant's loss of ability to earn a wage and loss of ability to work in the open labor market. See *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990). Accordingly, the Appeals Board finds claimant has sustained a sixty-seven percent (67%) permanent partial disability.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 14, 1994, shall be, and hereby is, modified and claimant, Ahmed El Balguiti, is awarded compensation against respondent, Marriott Hotel, and its insurance carrier, Argonaut Insurance Company, for an accidental injury occurring on September 7, 1990.

The claimant is entitled to 131.71 weeks temporary total and temporary partial disability totalling \$16,059.09 as stipulated, followed by 283.29 weeks of permanent partial

compensation of \$109.73 per week or \$31,085.41 for a 67% permanent partial general body disability making a total award of \$47,144.50.

As of July 21, 1995, there would be due and owing to the claimant 131.71 weeks temporary total and temporary partial compensation totalling \$16,059.09 as agreed, plus 122.29 weeks permanent partial compensation of \$109.73 per week in the sum of \$13,418.88 for a total due and owing of \$29,477.97, which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$17,666.53 shall be paid at the rate of \$109.73 per week for 161 weeks or until further order of the Director.

Future medical treatment for the claimant for injuries compensated in this proceeding may be awarded upon a proper application and a hearing upon notice to all parties.

Unauthorized medical expense pursuant to K.S.A. 55-510(c) in the amount of \$350.00 is also awarded to the claimant.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

Costs of transcripts in the record are taxed against respondent and insurance carrier as follows:

Metropolitan Court Reporters, Inc.	\$501.40
Hostetler & Associates, Inc.	\$122.95
Richard Kupper & Associates	\$226.00
Gene Dolginoff Associates, Ltd.	\$719.95
Appino & Briggs Reporting Service	\$146.20

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 1995.

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Topeka, Kansas  
Wade A. Dorothy, Lenexa, Kansas  
Robert H. Foerschler, Administrative Law Judge  
David A. Shufelt, Acting Director